In the Supreme Court of the United States

OCTOBER TERM, 1913

CHIN FONG, APPELLANT, v. SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO.	No. 604

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE

STATEMENT

The Government submits the following supplemental brief:

Appellant in his brief repeatedly asserts (1) that the Seattle inspectors and San Francisco commissioner each found he met the law's requirement as a domiciled merchant; (2) that the record shows that the department conceded he had (brief, pp. 3, 5, 8, 9, 10); and (3) that the demurrer conceded it because it was averred in the petition.

(1) The demurrer concedes nothing beyond the immigration record, because the petition avers (R., 3)

that the immigration record attached is a "complete copy," and all averments of the petition are but conclusions therefrom. While Chin Fong *claimed* (R., 21, 22, 23, 28) he had been advised by letter that he was an acknowledged merchant, the claim was opposed by the immigration record.

The report of Sissons, New York inspector (R. 28) and the report of McCall (R. 20) merely furnish information. The only *finding* in the record is that of the San Francisco officer (R. 18). Both reports and the findings show that the action taken in each instance was on the ground that the original entry was fraudulent.

So that the immigration officials never reached the question of sufficiency or the proof of merchant status. They simply held the original fraudulent entry precluded gaining a lawful domiciliary merchant status. The effort to give appellant a confessed or adjudicated domiciliary merchant status wholly fails. It the case were to go back that question would still be open to inquiry.

The infirmity of appellant's whole argument lies in assuming he could gain that status though his original entry was unlawful (brief, p. 8, top); and that the Government conceded he had that status. The Government argues he never could have it, and therefore never did have it.

No point is made that the finding of original fraudulent entry is not abundantly supported in the record.

ARGUMENT.

The Government insists (1) that this Court has no jurisdiction in direct review; (2) that the fairness of the hearing not being challenged, the decision of the immigration officers is final; and (3) that a Chinaman whose original entry was unlawful is not within the benefit of the act of 1893, 28 Stat. 7.

I.

This court has no jurisdiction in direct review.

This point is fully treated in the Government's original brief, pages 1 to 10. We but add:

Section 238, Judicial Code, as amended by the act of January 28, 1915, 38 Stat. 803, 804, authorizes a direct appeal—

> * * * in any case that involves the construction or application of the Constitution of the United States; in any case in which the * * * construction of any treaty * * * is drawn in question.

Before the passage of the act of 1893, *supra*, Chinese "proceeding to the United States * * * as merchants" were "allowed to *go and come*" (Art. II, treaty of 1880, 22 Stat. 826) without other restriction than the requirement of a visèd certificate (sec. 6, act of 1882, 22 Stat. 58, as amended by act of 1884, 23 Stat. 115); while Chinese laborers leaving the United States were permitted to return, if at departure they had in the United States either wife, child, or parent, or property of the value of $1,000, or debts of like

amount due them and pending settlement. No other return privileges were accorded.

The finding being that Chin Fong at the time of his first entry was proceeding to the United States, not as a merchant, but in order to enter fraudulently, plainly he could not have the benefit of the treaty. He made no claim of privilege to return as a laborer. Moreover, the latter privilege was but *statute* given. So that prior to the act of 1893 no fair contention could be made that such a case involved the construction of the treaty or the construction or application of the Constitution; while the claim that that act gave an added right of return can involve only the construction of the act itself. These constitutional and treaty features were urged in vain in *Lem Moon Sing* v. *United States*, 158 U. S. 538, 541, 549, wherein this court said:

> To avoid misapprehension, it is proper to say that the court does not now express any opinion upon the question whether, under the facts stated in the application for the writ of *habeas corpus*, Lem Moon Sing was entitled, of right, under some law or treaty, to reenter the United States. We mean only to decide that that question has been constitutionally committed by Congress to named officers of the executive department of the government for final determination. (550)

II.

The finality of the decision of the immigration officers.

The act of August 18, 1894, 28 Stat. 390, and section 25 of the act of 1907, 34 Stat. 898, 907, each provide:

> In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary . . . etc.

In *Lem Moon Sing* v. *United States*, *supra*, the court distinguishes the *Lau Ow Bew* case, 144 U. S. 47, relied on by appellant here, upon the ground that it arose before the act of 1894 was passed. The court said:

> He is none the less an alien because of his having a commercial domicil in this country. While he *lawfully* remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. * * * But when he *has voluntarily gone from the country*, and is beyond its jurisdiction, being an alien, he *cannot reenter the United States* in *violation of the will* of the government as *expressed* in *enactments of the law-making power*. He cannot, by reason merely of his domicil in the United States for purposes of business, demand that his claim to reenter this country by virtue of some statute or treaty, shall be determined ultimately, if not in the first instance, by the

courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the government in respect of a matter wholly political in its character. He left the country subject to the exercise by Congress of every power it possessed under the Constitution. (547–548.)

* * * * *

Now the difference between that case [Lau Ow Bew] and the present one is that, by the statutes in force when the former was decided, the action of executive officers charged with the duty of enforcing the Chinese Exclusion Act of 1882, as amended in 1884, could be reached and controlled by the courts when necessary for the protection of rights given or secured by some statute or treaty relating to Chinese. But, by the act of 1894, the decision of the appropriate immigration or custom officers excluding an alien "from admission into the United States under any law or treaty," is made final in every case, unless, on appeal to the Secretary * * * it be reversed. (548–549)

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* * * If the act of 1894 had done nothing more than appropriate money to enforce the Chinese Exclusion Act, the courts would have been authorized to protect any right the appellant had to enter the country, if he was of the class entitled to admission under existing laws or treaties, and was improperly excluded. But when Congress went further, and declared that in every case of an alien excluded

> by the decision of the appropriate immigration or customs officers "from admission into the United States under any law or treaty," such decision should be final, unless reversed by the Secretary * * *, the authority of the courts to review the decision of the executive officers was taken away. *United States* v. *Rogers*, 65 Fed. Rep. 787. If the act of 1894, thus construed, takes away from the alien appellant any right given by previous laws or treaties to reenter the country, the authority of Congress to do even that can not be questioned, although it is the duty of the courts not to construe an act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction. *Chew Heong* v. *United States*, 112 U. S. 536, 539, 559; *Head Money Cases*, 112 U. S. 580, 599; *Whitney* v. *Robertson*, 124 U. S. 190, 195; *Chinese Exclusion Case*, 130 U. S. 581, 600. There is no room in the language of the act of 1894 to doubt that Congress intended that it should be interpreted as we have done in this case. (549)

The above case was affirmed and explained in *Li Sing* v. *United States*, 180 U. S. 486, 490.

It is to be noted, too, that in the *Lem Moon Sing* case it was conceded that that Chinaman had gained a lawful domicile in the United States. The assertion that such a concession was made in this case has been shown to be in direct opposition to the record; but even had it been true none the less would the decision of the inspector of immigration at San Francisco have been final.

III.

Chin Fong is not within the benefit of the act of 1893.

Because in every feature other than the lawful prior domicile the *Lem Moon Sing* case is identical with the case at bar, it should conclude the question. Conceding, however, for arguments' sake that though the immigration officers' decision is final on the fact of frauduient entry, it might be open to review as to the law question involved, *i. e.*, whether one entering unlawfully could gain a lawful merchant's status under the act, we insist that that question was correctly decided.

Treaties and prior statutes divided Chinese into two great classes, laborers and nonlaborers, according to the purpose with which they came to the United States. And the large aim of all the legislation was to make sure that none save those intended to be admitted should enter or remain in the United States. Mindful that the act of 1893 followed and was produced by the *Lau Ow Bew* decision of this court declaring to a domiciled merchant an unrestricted right to go and come, it would seem plain that Congress intended the legislation to restrict and not to enlarge the privilege. The "treaty-merchant" class was the only one prior to its passage that could claim a right of return as a merchant, and the statute seems to have dealt only with those who could claim, and were claiming, a right of return on this ground. As to them, it considerably narrowed the definition of the word "merchant" and required an added showing of

at least a year's merchandizing. We are advised that in practice, however, the immigration officers have recognized the right of one entering as other than a merchant, even a laborer, to change to a merchant's status under this act and gain a return privilege after a year's conduct of such a business, even though in the case of a laborer the business or his interest therein be of less value than $1,000.

For the purposes of this case it is not necessary to determine whether the Department of Labor has or has not correctly construed the act. Conceding that it might be so read and that it, therefore, enlarged the privilege of return as to laborers, though restricting it as to treaty merchants, it is yet undeniable that Congress never meant to say to the Chinese—

> If you can steal into the United States in violation of law and hide yourself from the officials long enough to carry on a merchandising business for a year without their knowledge, though for 364 days of the year you were subject to arrest and deportation, by passing successfully the 365th day you shall be rewarded by being given a lawful domicile—a right to return to the United States if ever you leave them.

This court has held that the restrictions and deportation provisions of the general immigration act of 1907 apply to Chinese as well as to other aliens. *United States* v. *Wong You*, 223 U. S. 67, 69, 70. To uphold appellant's contention would be to read out of the operation of the act of 1907, contrary to

the *Wong You* decision, every Chinaman who could manage to stay in the mercantile business for one year, with the result that Chinese epileptics, consumptives, felons, anarchists, and panderers could all, by an initial unlawful entry and after persistent unlawful presence, with a merchandising feature annexed, gain an absolute and unassailable right to remain in and return to the United States.

It is idle to say—as does appellant—that this act gave a naked right to return so that the officers are bound to let the Chinamen enter, but that after admission they may seize them and deport them. Congress never contemplated any such absurdity. If so read, the immigration officers could seize for deportation, and deport, at any time after the completion of the year's period of merchandising, but the deported men could return on the first boat and force a right of reentry and be again subject to deportation. The Chinamen, to be affected by the act of 1893, were those, and those only, who, if they chose to go and return, could defend their right to remain after their return, and who, if they chose to stay after accomplishing their year of merchandising, could defend their right to stay in the United States.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

APRIL, 1916.

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No. 664.

In the Supreme Court of the United States

October Term, 1915

CHIN KING, APPELLANT,

vs.

DANIEL W. HAKER, COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

CHIN FONG, APPELLANT.
v.
SAMUEL W. BACKUS, COMMISSIONER OF Immigration for the Port of San Francisco. } No. 664.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION TO ADVANCE.

Comes now the Solicitor General, appearing on behalf of the appellee, and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Chin Fong, a Chinese subject, claiming to be a merchant in New York City, and desiring to make a temporary visit to China, made application to the immigration authorities at that point to preinvestigate his status as a Chinese merchant so that he might have issued to him a return merchant's certificate which would insure his immediate landing upon his return to the United States. An examination was conducted and it was reported that Chin Fong had been a merchant for more than a year prior to said application.

Thereafter the application and evidence taken thereon were forwarded to the Immigration Officer at the port of Seattle, Wash., through which port Chin Fong desired to depart for China, which officer denied the application on the ground that the original entry of the applicant was *surreptitious*. On appeal to the Secretary of Commerce and Labor the action of the Immigration Officer was sustained.

Said Chin Fong nevertheless departed for China, and upon his return made application to the Commissioner of Immigration at the port of San Francisco to reenter the United States as a *returning Chinese merchant*. The application was denied on the ground that the original entry of the applicant was *surreptitious*, and on appeal to the Secretary of Commerce and Labor the denial was sustained.

Thereupon he filed a petition for a writ of *habeas corpus* in the District Court of the United States for the Northern District of California, a demurrer to which was sustained and the application for the writ denied. (213 Fed. 288.)

Thereafter Chin Guy Get filed in the same District Court, for and on behalf of said Chin Fong, the amended petition herein on the grounds, among others, that the Commissioner of Immigration of the port of San Francisco and the Secretary of Labor had acted in excess of their jurisdiction, and that the right of Chin Fong to make the temporary visit to China hereinbefore mentioned was guaranteed by the Treaty between the United States and China of November 17, 1880.

A demurrer to this amended petition was sustained, an appeal prosecuted direct to this court, and said Chin Fong is now at large on bail.

The case is of importance to the Department of Labor, and especially the Bureau of Immigration, in the enforcement of the laws governing the admission and deportation of Chinese, and for that reason an early determination thereof is desirable.

It will be agreeable to counsel on both sides to have the case assigned for April 3, if that date is satisfactory to the court.

JOHN W. DAVIS,
Solicitor General.

JANUARY, 1916.

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